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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. PAUL DWAYNE KILGORE, Defendant and Appellant.	A154472 (Sonoma County Super. Ct. No. SCR-694346)

Defendant Paul Dwayne Kilgore appeals a judgment convicting him of the sexual abuse of three victims under the age of 14 and sentencing him to 150 years in prison. He contends the court abused its discretion by allowing four witnesses to testify regarding prior uncharged sexual abuse by defendant. He also contends that his sentence constitutes cruel and unusual punishment. We find no error and shall affirm the judgment.

Background

Defendant was convicted by a jury of two counts of continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a)) and four counts of lewd and lascivious acts upon a child (Pen. Code, § 288, subd. (a)). The jury also found true allegations that defendant's crimes involved multiple victims (Pen. Code, §§ 667.61, subds. (b), (e), (j)(2), 1203.066, subd. (a)(7)) and that two of the section 288 charges involved substantial sexual conduct with the victims (Pen. Code, § 1203.066, subd. (a)(8)).

The first victim, who was 13 years old at the time of trial, testified that he met defendant when he was six years old and that defendant often took him swimming and had him over to his house. Defendant touched the victim's penis on numerous occasions

both in defendant's home and in the pool locker room. A second victim, who was 15 years old at the time of trial, testified that he met defendant when he was 10 years old. He considered defendant a family friend; defendant took him to swimming pools, movies, festivals and fairs. He detailed numerous instances in which defendant had touched his penis. The third victim was 16 years old at the time of trial. He had known defendant since he was six. Defendant had also taken him swimming and had him to his home. He also detailed several instances in which defendant touched his penis, including instances in which defendant touched his penis with a vibrator. Defendant also had this victim attempt to masturbate in front of him. The three victims knew each other and were often together when the abuse occurred.

Prior to trial, the prosecution sought to introduce testimony of eight additional witnesses who claimed to have been sexually abused by defendant. Defendant admitted that the evidence was admissible under Evidence Code[1] section 1108 to show his propensity for sexual acts on minor boys, but argued that the proposed testimony was more prejudicial than probative. The trial court ruled that the proffered testimony from four of the eight witnesses should be excluded under section 352 because it was too remote or not similar enough, and more prejudicial than probative. The court allowed the remaining four witnesses to testify, finding their proffered testimony more probative than prejudicial. The court found that the prior alleged acts by defendant were similar to the current acts and that defendant's prior conduct was not more inflammatory than the charged acts. The court recognized that, while some of the prior alleged acts were remote in time, the evidence was not likely to confuse or distract the jurors or result in an undue consumption of time.

At trial, Stephan, who was 42 years old at the time of trial, testified that when he was in fourth and fifth grades, defendant was his basketball coach. On three to four occasions, while accompanying the team on excursions to fast-food restaurants, defendant touched his groin over his clothing. Jon, who was 52 years old at the time of

[1] All further statutory references are to the Evidence Code unless otherwise noted.

trial, testified that he knew defendant from the afterschool program he attended as a child. He estimated that he stayed the night in defendant's home 10 to 20 times over the years and that on more than five of those occasions defendant touched his penis. Eric, who was 49 years old at the time of trial, identified defendant as his fourth- and fifth- grade basketball coach and also knew him from the recreation center. He estimated that on more than 20 occasions when they were alone at the recreation center, defendant touched his penis. Jesus, who was 22 years old at the time of trial, was the first victim's older brother. He met defendant when he was in the third grade. Defendant would treat him to excursions to restaurants, swimming pools, and overnight trips. He detailed how defendant touched his penis in the swimming pool locker room.

The trial court imposed consecutive 25-year terms on each of the six counts on which the jury found defendant guilty. Defendant timely filed a notice of appeal.

Discussion

1. *The court did not abuse its discretion in admitting evidence of uncharged sexual abuse.*

Section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Section 1108 was enacted "to expand the admissibility of disposition or propensity evidence in sex offense cases." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) "Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes." (*Falsetta*, at p. 915.) Such evidence "constitutes relevant circumstantial evidence that [the defendant] committed the charged sex offenses." (*Id.* at p. 920.) Evidence of prior sexual offenses under section 1108 may be considered for any relevant purpose, "subject only to the prejudicial effect versus probative value weighing process required by section 352." (*People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

Section 352 provides that the "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a)

necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In cases involving evidence potentially admissible pursuant to section 1108, trial courts "must engage in a careful weighing process under section 352." (*People v. Falsetta, supra*, 21 Cal.4th at p. 917.) Various factors inform "the trial court's discretionary decision to admit propensity evidence under sections 352 and 1108." (*Falsetta*, at p. 919.) "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Id*. at p. 917.) We review the trial court's decision to admit evidence under sections 1108 and 352 for an abuse of discretion. (*People v. Story* (2009) 45 Cal.4th 1282, 1294-1295.)

The relevance of the witnesses' testimony cannot be disputed. In each of the instances, defendant used his position of authority to gain the boys' trust and then sexually abused them in a fairly consistent manner. The sole question is whether the court abused its discretion in finding that the strong probative value of this evidence was not outweighed by its potential prejudice. While three of the four witness described incidents that occurred well in the past, the gap in time does not negate the reasonable inference that defendant had the propensity to commit the charged offenses. In *People v. Branch* (2001) 91 Cal.App.4th 274, 285, the court explained "Remoteness of prior offenses relates to 'the question of predisposition to commit the charged sexual offenses.' [Citation.] In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. However, as reflected above, significant similarities between the prior and the charged offenses may 'balance[] out the remoteness.' " As noted above, the

similarities between the charged and uncharged conduct in this case is remarkably strong.

Defendant also suggests that the uncharged conduct was "necessarily . . . far more aggravated and inflammatory than the charged crimes" because the charged crimes involved only three victims and the uncharged offenses involved four victims. The number of victims alone, however, does not render the uncharged acts more inflammatory. (See, e.g., *People v. Soto* (1998) 64 Cal.App.4th 966, 990-991 [Evidence of uncharged crimes against two victims was admissible as propensity evidence in trial on sexual abuse charges involving a third victim.].) In analyzing whether the uncharged acts are more inflammatory than those charged, we consider whether the evidence "uniquely tends to evoke an emotional bias against the defendant as an individual" (*People v. Branch*, *supra*, 91 Cal.App.4th at p. 286) and whether " ' "it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction" ' " (*ibid*.). Looking at the nature of the offenses, the conduct involving the third victim, for which the jury found true the substantial sexual conduct allegation, is considerably more disturbing than many of the uncharged acts. There is simply no likelihood that the jury would be driven to punish defendant by an emotional reaction to the uncharged conduct more so than to the charged conduct.

Finally, contrary to defendant's characterization, the court did not allow an "avalanche of evidence" of uncharged sex abuse. The court carefully sorted through the eight proposed witnesses and permitted only those to testify whose experience with defendant was sufficiently similar to the charged conduct and whose testimony would not be more inflammatory than the charged offenses. The evidence admitted was neither unduly time consuming nor likely to confuse the jury. The court did not abuse its discretion in permitting the testimony.

2. *Defendant's sentence is not cruel and unusual*.

Defendant was 70 years old when he was sentenced to 150 years in prison. Citing

concurring and dissenting opinions by the late Justice Mosk addressing the issue, he contends that his sentence constitutes cruel and unusual punishment under the state and federal constitutions. (See *People v. Deloza* (1998) 18 Cal.4th 585, 600-602 (conc. opn. of Mosk, J.) [sentence of 111 years in prison impossible for a human being to serve, gratuitously extreme, serves no rational legislative purpose under either a retributive or utilitarian theory of punishment, and demeans the government inflicting it and the individual on whom it is inflicted]; *People v. Hicks* (1993) 6 Cal.4th 784, 797 (dis. opn. of Mosk, J.) ["sentence . . . that cannot possibly be completed in the defendant's lifetime makes a mockery of the law and amounts to cruel and unusual punishment"].) He also argues that his sentence is the functional equivalent of a sentence of life imprisonment without parole because he cannot "possibly hope to complete the sentence in his lifetime" so that the court violated his right to due process by imposing the sentence without the procedural and substantive safeguards found in section 190.2. We disagree.

Although undoubtedly far longer than defendant's life expectancy, we cannot say that under current norms defendant's sentence is "grossly disproportionate" to the severity of his crimes. (*Ewing v. California* (2003) 538 U.S. 11, 20-21 ["The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.' "]; *People v. Haller* (2009) 174 Cal.App.4th 1080, 1087 ["The Eighth Amendment prohibits imposition of a sentence that is 'grossly disproportionate' to the severity of the crime."].) A de facto life without parole sentence imposed on an adult for the sexual abuse of three children is not cruel and unusual under existing standards. (*People v. Wallace* (1993) 14 Cal.App.4th 651, 666 [prison sentence of 283 years 8 months for multiple rape and other sexual offenses not cruel and unusual]; *People v. Huber* (1986) 181 Cal.App.3d 601, 633-635 [sentence of 106 years 4 months for multiple violent sex offenses does not constitute cruel or unusual punishment]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 532 [consecutive prison terms totaling 129 years for the commission of 25 offenses against a single victim not cruel or unusual].) Moreover, given defendant's age, anything other than an extremely short sentence would likely amount to a de facto life without parole

sentence. Defendant cites no authority for the proposition that imposing a sentence on an elderly defendant that exceeds his life expectancy necessarily violates the Eighth Amendment. There was no error in defendant's sentence.

Disposition

The judgment is affirmed.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
TUCHER, J.